

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

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JOSEPH MANTHA, on behalf of himself :
and others similarly situated,

Plaintiff,

v.

QUOTEWIZARD.COM, LLC,

Defendant.

: Civil Action No.
: 1:19-cv-12235-LTS

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BEFORE THE HONORABLE LEO T. SOROKIN, DISTRICT JUDGE

SCHEDULING CONFERENCE
VIDEOCONFERENCE

Tuesday, April 7, 2020
10:12 a.m.

John J. Moakley United States Courthouse
One Courthouse Way
Boston, Massachusetts

Rachel M. Lopez, CRR
Official Court Reporter
raeufr@gmail.com

A P P E A R A N C E S

On behalf of the Plaintiff:

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P R O C E E D I N G S

(In open court via videoconference.)

THE DEPUTY CLERK: Today is April 7th, the case of Mantha v. QuoteWizard, civil action 19-12235, will now appear before this Court.

Counsel, please identify themselves for the record.

MR. POLANSKY: Good morning, Your Honor. This is Kevin Polansky, on behalf of the defendant, QuoteWizard, LLC -- .com, LLC.

THE COURT: Good morning.

Who do we have for the plaintiff? Sorry, I missed it if you said your name.

THE DEPUTY CLERK: I'm trying to unmute him. He keeps going back to mute -- okay.

MR. MCCUE: Matthew McCue, Your Honor.

Can you hear me now?

THE COURT: Yes, I can hear you now. Great.

MR. MCCUE: I apologize.

THE COURT: No problem. We're all getting used to this brave, new world.

Okay. So thanks for coming, first of all. I hope you're all healthy and -- I have a question, couple of questions, just going over all of this and thinking about it.

First, explain to me, Mr. Polansky, you have this consent defense you assert, right?

1 MR. POLANSKY: Yes, Your Honor.

2 THE COURT: So what is the discovery you need for
3 that?

4 MR. POLANSKY: So it's our understanding, the
5 plaintiff is going to allege that the consent is fraudulent,
6 and we will seek pointed discovery with respect to
7 plaintiff's going on to the website, in which he provide the
8 consent; his date around -- or his use of his computer with
9 telephone during that period of time to show that he did
10 actually provide consent or one of his agents or affiliates
11 did.

12 THE COURT: So maybe -- I mean a little more
13 granular detail. Your client has relationship with this
14 company, Drip, LLC?

15 MR. POLANSKY: Yes.

16 THE COURT: And Drip -- like, the plaintiff went on
17 what website, run by whom, doing what, according to what you
18 think?

19 MR. POLANSKY: They went onto an insurance website
20 to obtain auto insurance quotes.

21 THE COURT: Okay. And who runs that website?

22 MR. POLANSKY: Who -- I'm not sure.

23 THE COURT: Would that be Drip or somebody else?

24 MR. POLANSKY: It would be somebody else.

25 THE COURT: I see. So your understanding is he

1 went on some website, said, "I want some information on
2 insurance quotes," and provided his cell phone number?

3 MR. POLANSKY: Yes, his consent, and opted in to
4 receiving communications.

5 THE COURT: Okay. And that conduct is the conduct
6 that you -- is what you view as the consent?

7 MR. POLANSKY: Yes, Your Honor.

8 THE COURT: And then where does -- so that
9 insurance website, not run by -- that's not a QuoteWizard
10 website?

11 MR. POLANSKY: It is not.

12 THE COURT: Somehow that information gets passed on
13 to your client.

14 MR. POLANSKY: Yes. So that -- that -- in the
15 industry, it's called a lead. That lead would be sold to a
16 company like my client.

17 THE COURT: I see. So the -- so it may have been
18 the website might have been auto rates --
19 insuranceautorates.com, and they might run on a website and
20 attract traffic, let's just say. And then according to your
21 information, the plaintiff went on that website and said,
22 "Yes, send me some quotes. Here's my cell phone number. I
23 agree," whatever.

24 And then your client purchased, probably not in an
25 individual negotiated transaction, but some Internet auction

1 or en masse, purchased that lead, among others, and then sent
2 the two text messages?

3 MR. POLANSKY: Yes, Your Honor.

4 THE COURT: Okay. And so the -- and where does
5 Drip fit into this?

6 MR. POLANSKY: Drips is a vendor that my client
7 uses to send text messages to consumers who have provided
8 consent.

9 THE COURT: So once your client got the lead, it
10 uses Drip to do the actual work?

11 MR. POLANSKY: Yes.

12 THE COURT: Okay. So for your -- so what you --
13 now I understand just sort of how it works. I appreciate
14 that.

15 So now coming back, the discovery that you need to
16 assert your defense is what? Before you get to the question
17 of fraud.

18 MR. POLANSKY: So we already have the consent
19 information. We've provided that to plaintiff's counsel. So
20 we have what we believe is enough to prove our case.

21 THE COURT: So you could move for summary judgment
22 today on the consent defense. And the reason you need
23 discovery is because you anticipate, based on your
24 conversation with plaintiff's counsel, that they're going to
25 assert that the consent was fraudulent?

1 MR. POLANSKY: That's correct, Your Honor.

2 THE COURT: And so what is the discovery that you
3 need with respect to that?

4 MR. POLANSKY: We would seek discovery as to the
5 plaintiff's call records, use of his computer on or around
6 the date the consent was provided, his whereabouts that date.
7 We anticipate that they're going to allege that the plaintiff
8 couldn't have provided the consent on that day, or something
9 like that. I don't know the actual details, but it would be
10 involved -- it would be very directed at the day the consent
11 was provided.

12 THE COURT: Okay. So for the plaintiff, is the
13 fraudulent consent argument that he never went on the website
14 at all, he didn't provide it? Or is it a fraud in what
15 was -- like the way that the number was obtained?

16 MR. MCCUE: No, Your Honor. The intention is that
17 the entire lead process is fraudulent. My client --

18 (Internet connection drops.)

19 THE COURT: I'm sorry, you broke up for one second.
20 Your client did what?

21 MR. MCCUE: My client did not go on any website,
22 did not ask for these calls, did not consent. And our
23 contention is that the entity that QuoteWizard is buying
24 these leads from is selling them fake leads. These are made
25 up.

1 THE COURT: Okay. So this is not the case where
2 you're going to say Mr. Mantha went on the website and
3 they -- there was something about what was said on the
4 website that lied to him about getting his number, or
5 something like that. This is, "I didn't go on the website at
6 all. I didn't ever go on that website. I didn't ever agree
7 to that. And to the extent these -- this -- this third party
8 company says that I did, that's not true."

9 MR. MCCUE: That's correct, Your Honor. And then
10 there's an alternative argument that even if he did go on
11 this website, which he didn't, the consent that they claim
12 they obtained is not TCPA compliant. The TCPA is very
13 specific about what is consent. It has to be prior, express
14 consent, signed in writing, and it has to specifically
15 mention the entity who's going to call. So even if,
16 theoretically, QuoteWizard gets a bench of leads from people
17 who say they're interested in auto insurance, that's not
18 consent to send them text messages or robo calls. That could
19 be a consent to send them a letter or an e-mail, but not a
20 telemarketing call.

21 THE COURT: So you have two arguments, then.

22 MR. MCCUE: Right.

23 THE COURT: One is, he didn't go on the website,
24 and it didn't -- and second, it doesn't matter if he did,
25 because if he did, the documents upon which defendant relies

1 is said, "This is the consent," aren't good enough to
2 establish, as a matter of law, consent.

3 MR. MCCUE: That's correct, Your Honor. And we
4 expect that to be the same on a common basis to all class
5 members.

6 THE COURT: So I guess my question for the two of
7 you, then -- and so the discovery as to the -- whether he
8 went on the website or not, that seems pretty focused and
9 narrow, right? That's like you have a --

10 You, Mr. Polansky, have an idea of when you think
11 he went on the website, like a given day, right?

12 MR. POLANSKY: Yes, Your Honor.

13 THE COURT: And is it just one day, one time?

14 MR. POLANSKY: Yes.

15 THE COURT: So what you're looking for is like
16 records from the third party as to the IP address as to
17 whoever gave -- if they have it, whoever gave -- whoever
18 signed in and did, said -- handed over Mr. Mantha's cell
19 phone number.

20 MR. POLANSKY: That's correct.

21 THE COURT: If they have such records.

22 And from Mr. Mantha, records like his Internet
23 access records and his cell phone location records for like
24 the day before, the day of, and the day after. And then
25 possibly a brief -- a targeted deposition.

1 MR. POLANSKY: Yes, Your Honor.

2 THE COURT: And then with respect to the scope of
3 the consent, did the -- does the third party provide you,
4 when they give your client the number, they provide some,
5 like, form that the person signed?

6 MR. POLANSKY: Yes, Your Honor. There's a TCPA
7 disclosure.

8 THE COURT: Okay. And I take it that's probably
9 the same -- like this isn't the only lead your client bought
10 from this company.

11 MR. POLANSKY: No. No.

12 THE COURT: And the TCPA disclosure is presumably
13 the same for lots of people. Maybe it gets revised
14 periodically, but other than that, it's the same.

15 MR. POLANSKY: It may be the same for certain class
16 members, but not all. I mean, there are different leads
17 purchased from different lead generating companies of
18 partners. So --

19 THE COURT: From this partner.

20 MR. POLANSKY: From this partner, they may be
21 similar, yes.

22 THE COURT: Okay. All right. So it -- so it seems
23 like they're -- and I take it, for the plaintiff, the
24 discovery you would want with respect to whether he went
25 online and signed up or not, is it any different than what

1 Mr. Polansky described?

2 MR. MCCUE: No, Your Honor. I agree, it's really
3 simple. And I think a lot of it would focus on the IP
4 address, which is a subpoena to the telecommunications
5 carrier, which we --

6 THE COURT: Okay. And then with respect to the
7 disclosure, whether the disclosure or consent, to the extent
8 it was actually given, is sufficient, first, as to your
9 client, Mr. Mantha, what, if anything, do you need beyond
10 what you have?

11 MR. MCCUE: Nothing, Your Honor. This argument is
12 defendant's burden, so it's up to them to come forward with
13 valid consent.

14 THE COURT: So if they came forward -- if they move
15 for summary judgment today and said, "Here's the document,
16 the TCPA disclosure that Mr. Mantha signed," putting aside
17 the question -- let's say for the moment it was assumed or
18 given that he had gone online, and he had given a cell phone
19 number in the face of that disclosure, what -- and they said,
20 "Summary judgment, this disclosure is good enough," is your
21 response, "Judge, as a matter of law, it loses"? Or do you
22 want any discovery before you respond to that?

23 MR. MCCUE: Well, number one, matter of law loses,
24 because we submit an affidavit from Mr. Mantha, which we're
25 prepared to do, that says he never went on this website.

1 THE COURT: I understand. But that doesn't have to
2 do with whether the disclosure is good enough. That has to
3 do with whether he agreed to the disclosure.

4 MR. MCCUE: Right.

5 THE COURT: Assume he agreed. Let's just say that
6 it were determined that he went on the website, and he signed
7 that form that Mr. Polansky is giving you.

8 MR. MCCUE: Right.

9 THE COURT: Okay. Then I understand you to be
10 saying that you have a second argument, even if you lose the
11 argument that he didn't go online.

12 MR. MCCUE: Sure.

13 THE COURT: And that argument is: That form is no
14 good. It doesn't matter if he signed it.

15 MR. MCCUE: Yeah. And that's the number-one
16 argument. I guess the only discovery that I would want is
17 some type of basis to verify that the information that I'm
18 getting is legitimate. Saying we got this consent document
19 from a third party, I would want to send a subpoena to that
20 third party to confirm what's being produced is accurate.

21 THE COURT: Sure. Okay. So my -- I guess my
22 question, then, having read over -- and let me -- is there
23 more than --

24 I read over docket number 36, defendant's
25 statement. Was there a statement that another one --

1 MR. MCCUE: Yes, Your Honor. There's a plaintiff's
2 statement that's document 34.

3 THE COURT: All right. Give me one second,
4 because -- and I apologize, I need one minute.

5 MR. MCCUE: Sure.

6 THE COURT: Okay. So I guess maybe this is for
7 you, Mr. Polansky, but my question is, really, why shouldn't
8 we first -- it seems in line with what plaintiff was
9 proposing, but why shouldn't we first have a very brief
10 period for the consent question -- really two questions, the
11 consent question, like did he go online or not, and did he --
12 is the -- are the forms you have, assuming he went online,
13 good enough?

14 It seems like the discovery you both need for that
15 is very narrow; that you can get that -- putting aside corona
16 for the moment. Imagine that. It's kind of a sweet image --
17 and it wouldn't take that long. And then one or two things
18 happens. You either both look at it, and you're like, "You
19 know what? He went online." Or he didn't go online, or --
20 in which case, you could agree to resolve it among
21 yourselves. Or you can't agree. Like you think you got a
22 good argument that he went online, Mr. Polansky, and
23 plaintiff thinks he has a good argument that he didn't. And
24 you submit it for summary judgment.

25 But if, in fact, he went online and signed the

1 form, and if the form is a valid form, which is the other
2 question -- which seems like there's not a lot of facts and
3 it's more of a legal question -- on the one hand, if you're
4 right, Mr. Polansky, you win. Probably case over. And on
5 the other hand, it clarifies things, to some degree, because,
6 first of all, if you lose, it gets rid of the question of
7 whether this individual plaintiff can go forward or not. If
8 you win -- and it also --

9 So I guess it clarifies a number of junction points
10 in the litigation. Because if they sold you a lead that --
11 where the guy didn't go online, then it raises all sorts of
12 questions about are you going to be suing them for breach of
13 contract? You might be wondering, "Is this the only lead
14 like this that they sold us," and, "What's the scope of
15 this?" and that might impact your client's position about
16 what they're doing.

17 If he went online, and there's the question about
18 the disclosure, so I'm just wondering why we don't do that
19 first. Resolve those questions, and then figure out how to
20 proceed next.

21 MR. POLANSKY: Your Honor, I think that's exactly
22 what we proposed, which is going forward with the consent
23 issue, filing a motion for summary judgment on that issue,
24 and resolving it, before we get into class discovery, class
25 records. The plaintiff proposes doing those simultaneously.

1 THE COURT: I see. So the difference -- the way
2 you see it is in their -- I was going to get to that. So the
3 real difference between the two of you is over whether to
4 look at call dialing records now or not?

5 MR. POLANSKY: Yes.

6 THE COURT: So first, before we get to that, how
7 much time do each of you, starting with plaintiff's counsel,
8 do you think you need to take the discovery you need in order
9 to look at the question of whether Mr. Mantha went online,
10 and whatever you need about whether the disclosure, quote, he
11 got, the one that the defendant relies on, asserting it's the
12 one he got, until those two questions are ready to be someone
13 to start writing a summary judgment motion?

14 MR. MCCUE: Your Honor, from plaintiff's
15 perspective, we set out in a -- on docket 34 what our dates
16 would be for that. And we -- I envisioned doing that in a
17 few months and being ready to file dispositive motion as to
18 consent on July 31, 2020.

19 THE COURT: Okay. What do you think about that,
20 Mr. Polansky, time-wise?

21 MR. POLANSKY: Your Honor, on just the issue of
22 consent, I think that would be perfectly fine.

23 THE COURT: Consent and the viability of the notice
24 that you're relying on as to Mr. Mantha.

25 MR. POLANSKY: Sure, yeah, that's just the legal

1 argument, so we could brief that at the same time.

2 THE COURT: Yeah. Okay. So then that would mean
3 initial strike 4/15 disclosures.

4 And I don't see the July 31st date in the chart on
5 docket number 34.

6 MR. MCCUE: It says, "Deadline to file dispositive
7 motion as to consent," the fourth or fifth box down on
8 page 5.

9 THE COURT: Oh. Okay. Maybe I'm on the wrong
10 page. Sorry.

11 MR. MCCUE: I submitted two tables, Your Honor.
12 One was --

13 THE COURT: I see. Yes. Sorry.

14 Okay. Who goes first on the dispositive motion on
15 the -- there are two aspects of consent, one is fraud, and
16 one is -- this is your burden. It's an affirmative defense,
17 right, Mr. Polansky?

18 MR. POLANSKY: Yes.

19 THE COURT: So why don't you go first.

20 MR. POLANSKY: Okay.

21 THE COURT: And say by July 31st, why he did
22 consent, and why the -- and why the form of consent suffices.

23 MR. POLANSKY: Yes, Your Honor.

24 THE COURT: And then do you want 30 days for an
25 opposition?

1 MR. MCCUE: That would be fine, Your Honor.

2 THE COURT: All right. So we'll say 8/30.

3 And I think that's really an opposition and
4 cross-motion on those issues.

5 MR. MCCUE: Correct.

6 THE COURT: But I'm going to just say 20 pages for
7 each of you, because it's not like your -- your opposition is
8 not encompassing new issues. It's the same two questions.

9 And then a reply -- is two weeks enough for the
10 reply? You want a little more.

11 MR. POLANSKY: Yeah. Could we make it 21 days,
12 Your Honor?

13 THE COURT: Sure. 9/21 for the reply. It's a
14 reply opposition. I'm going to say it's a little bit --
15 normally, I would say for cross-motions 20 pages, 30 pages
16 for the memo in support of the cross-motion opposition;
17 20 pages for the reply, 10 pages for the sur-reply. This
18 doesn't seem like it's that kind of issue, because it seems
19 like you're both moving -- you're really moving on the same
20 issue. So I'm going to say 20 pages for the opening brief,
21 20 pages for the opposition, seven pages for the reply. If
22 you think it really merits more, you can ask for more pages.

23 MR. POLANSKY: Yes, Your Honor.

24 MR. MCCUE: That should be fine, Your Honor.

25 THE COURT: All right. And it doesn't seem like a

1 sur-reply thing, but if you want a sur-reply -- if you want a
2 sur-reply, I'll build it in now. If you're going to do one,
3 we'll say by 9/28, five pages.

4 MR. POLANSKY: Sure.

5 MR. MCCUE: I'll only use it if I need to.

6 THE COURT: All right. So that's -- and I don't
7 see any amendment of the pleadings out of this.

8 MR. MCCUE: Your Honor, if I could address that,
9 just briefly.

10 THE COURT: Yeah. Sure.

11 MR. MCCUE: As you recall, the initial complaint
12 also alleges use of an autodialer, ATDS. And you granted the
13 motion to dismiss on the basis that there's specific facts
14 sufficiently alleged.

15 THE COURT: Right.

16 MR. MCCUE: Since that motion to dismiss was
17 granted in part, QuoteWizard did disclose Drips. I had asked
18 them to disclose Drips before that, but they declined to do
19 so.

20 So if you look at paragraph 2, Your Honor, of
21 document 34, I lay out -- excuse me, Drips sends texts via
22 what are called --

23 THE COURT: Page 2 or paragraph 2?

24 MR. MCCUE: It's footnote 2 on page 2.

25 THE COURT: Oh, I see. Yeah.

1 MR. MCCUE: It might just be more efficient, Your
2 Honor, if you just take a moment to read that.

3 THE COURT: Yes. Hold on one second.

4 (The Court reviews the document.)

5 THE COURT: Okay. I read it.

6 MR. MCCUE: So that issue raises an amendment to
7 the pleadings to get back in the ATDS, because we do suspect
8 that now we have a more specific facts to allege an ATDS use.
9 And I would not just like to rely upon Drips' website. I
10 would like to take some discovery on that point and then be
11 able to amend to get the count back in.

12 THE COURT: So is the idea -- well, it seems like
13 two different things. One is, if you want to amend, based on
14 that, (a), you're absolutely entitled to try to amend based
15 on that. As to whether that's sufficient or not, I have no
16 idea. I would have to think about that and see what you all
17 said to me about it.

18 If what you want to do is take discovery, how --
19 what is the basis to take discovery on that topic?

20 MR. MCCUE: So the basis, it dovetails with the
21 call records, Your Honor. But let me first focus on the ATDS
22 issue. I mean, obviously, the complaint is still alive, just
23 based upon the do-not-call allegation. As part of my duty to
24 the class, I need to investigate other causes of action that
25 could be alleged.

1 These are two distinct violations of the TCPA.
2 Autodialer is under 227(b), and the do not call is under
3 227(c). So they're completely separate, and you can stack
4 TCPA violations. So my position would be I have a duty to
5 investigate all potential claims that arise from these calls,
6 and ATDS use is certainly one of them.

7 So I would seek discovery from Drips as to what is
8 the machine that makes these calls? I would want the manual.
9 I would want to know how these calls are delivered. You
10 know, what Drips seems to say is these are chatbots. So
11 that's completely different from individual sales rep at
12 QuoteWizard sending a text to a consumer. It's completely
13 different.

14 THE COURT: So what you would want is discovery
15 from Drips about how Drips did these two text messages.

16 MR. MCCUE: That's correct, Your Honor.

17 THE COURT: And that would be -- so what kind of
18 discovery would that be? Document requests? 30(b)(6)?

19 MR. MCCUE: That would be a subpoena to Drips and
20 potentially a follow-up deposition. And then, you know,
21 frankly, this issue dovetails with the call records, is that
22 it's much more efficient just to find out -- not limit the
23 inquiry to the two texts, but find out how did Drips send
24 text messages for QuoteWizard, generally. And that's the
25 same as for the call records.

1 I mean, when we talk about efficiency, Your Honor,
2 I think we're -- it's proper to focus on consent, because if
3 there's a valid consent defense, the case goes away. It's
4 the same issue with call records. I need to know at the
5 outset, or as early as possible, what's the scope of the
6 case? What's the size of the case? Is this a class action
7 that's worth spending the resources on to go all the way
8 through? I don't know without the call records. And the
9 call records are now in possession of a third party. We
10 could get them via --

11 THE COURT: When you say the "call records," what
12 does that mean?

13 MR. MCCUE: Text records. So they're similar to
14 call detail records that you would see from a cell phone or
15 from a landline.

16 THE COURT: About what? These are the -- you mean
17 the records that Drips would have of every call they ever
18 made for what? In the four years?

19 MR. MCCUE: Right. Every text solicitation --
20 we're talking telemarketing calls. Every telemarketing text
21 that Drips sent for QuoteWizard, going back four years. Now,
22 that might mean -- it depends on how long the relationship
23 has been going on and how extensive it is. The statute of
24 limitations goes back four years.

25 And these are electronic records, Your Honor. This

1 is like a simple subpoena and a -- these are produced
2 electronically. So it would be getting the text records for
3 the text campaigns at issue and then also discovery about how
4 the calls were sent.

5 THE COURT: All right. And you're -- the reason to
6 do that now is, one, you say that given your duties that you
7 described, you say this would be relevant to determining
8 early on whether or not you have a viable basis to replead
9 Count 1; and, two, it allows you to assess the scope of the
10 case as in did Drips do 42 phone solicitations for
11 QuoteWizard, or 42 million, and the how --

12 You want to look at the how for these two or the
13 how for all of them?

14 MR. MCCUE: The how for all of them, Your Honor. I
15 suspect it's the same exact, but I -- it's so inefficient to
16 get the information as to two, and then a year later have to
17 go back and get the same information as to the others.

18 THE COURT: All right. What do you say about all
19 of that, Mr. Polansky?

20 MR. POLANSKY: Well, Your Honor, I think it would
21 be improper at this point to allow the plaintiff to conduct
22 discovery on a dismissed claim. I think that it would be
23 outside of the procedure under Rule 26, the relevance
24 procedure, and that now we're seeking discovery to replead
25 and discover things that otherwise have been dismissed. I

1 think that's completely improper. And I'm not aware of any
2 case law that would allow plaintiff to go in, seek discovery,
3 in order to attempt to revive a claim that's already been
4 dismissed.

5 In addition, there's no benefit. I mean, certainly
6 plaintiff doesn't need the call records to establish any
7 potential size or scope of a class action, and they certainly
8 wouldn't need the information relating to any putative class
9 member for any other basis than to know what the potential,
10 you know, class size or settlement value would be in this
11 case. And on that basis alone, you know, it's our position
12 that every individual that was called had provided consent,
13 and so it would be an individualized assessment on every
14 individual and it would be a futile effort.

15 But the burden and expense at this stage in the
16 litigation would outweigh the necessity to obtain those
17 records, when the plaintiff still has to get past, you know,
18 a summary judgment motion on its individual claims. I mean,
19 it's not as simple as just transferring over the call records
20 from Drips.

21 And by the way, Drips is a nonparty. So we have to
22 look at it under a Rule 45, you know, burden standpoint.

23 The information would also be available like from
24 QuoteWizard. These are QuoteWizard's records. So
25 QuoteWizard would have a say in, you know, reviewing the

1 information. It doesn't relate to every single person or
2 text message that was sent by Drips. I mean, the potential
3 class only relates to individuals that were set to receive
4 the text two times or more, that were on the do-not-call
5 registry. That would not be as simple as just turning over
6 all the records, because, again, it's QuoteWizard's position
7 and business practice to only call individuals with consent.
8 They would have to obtain and determine who of that list was
9 on the do-not-call registry. That would be a significant
10 expense and burden.

11 THE COURT: What do you say, counsel, as to the
12 question of whether you can take discovery on a claim that's
13 been dismissed?

14 MR. MCCUE: Your Honor, I -- Attorney Polansky
15 thinks it's outrageous. I feel exactly the other way. All
16 the time in cases, at the beginning, you don't know the scope
17 of violations or theories of allegations, and that's why you
18 amend complaints. You get into discovery; you find out
19 exactly what happened; you learn more than you new at the
20 very beginning. And that's particularly true with ATDS use,
21 because the consumer has no idea what the machinery is at the
22 end.

23 And I would submit to Your Honor, if you take a
24 look at paragraph 2, just based upon that, we have a
25 good-faith basis to allege ATDS use when they are using

1 AI-driven chatbots to send text messages. So I submit, Your
2 Honor, you dismissed out this count at the outset. And now,
3 even today, the facts have changed, based upon Drips'
4 disclosures on its website.

5 And as to burden, Your Honor, this is a -- I do
6 telemarketing cases all over the country. There is no burden
7 to QuoteWizard, whatsoever, to send a subpoena to Drips
8 citing, "Send us these text records." There's nothing. So
9 that's Drips' battle to fight.

10 And I have to submit, Your Honor, it is so
11 important to get these call records not just preserved, but
12 in our possession, because who knows what is going to happen
13 going forward. I've had situations where third parties say,
14 "Oh, I preserved what I thought you wanted," which was like
15 the call to the plaintiff, but not calls to the class
16 members. You get caught up in situations where there's a
17 miscommunication. I've had cases where the data was, quote,
18 preserved, and then I found out it was in a drive in the
19 telemarketer's garage.

20 I don't want to risk those situations. I want to
21 preserve this evidence and analyze it to figure out if this
22 is a case that's worth pursuing or not. And I'm happy to do
23 so under protective order, whatever.

24 And another issue that is absolutely fair game is
25 if QuoteWizard is saying all of these consumers consented,

1 I'm entitled to challenge that. I'm entitled to contact
2 consumers who got these calls and say, "Did you really
3 consent?" How valid is that defense?

4 So there's a whole host of reasons why obtaining
5 this data right now is important. And I submit to you, as I
6 said in my statement, that if we focus on consent and we get
7 call records produced and analyzed, we will know, with
8 virtually no discovery, if this is a meritorious case that's
9 worth pursuing, and I would just respectfully submit that we
10 go along those lines.

11 THE COURT: Okay. This is what I'm going to do. I
12 want to think about this question a little bit. I'm going to
13 set the following -- the schedule we did talk about for sure,
14 because you both agree to that, and I do think it makes a lot
15 of sense to resolve that early on, which is initial
16 disclosures by April 15th. The consent question discovery
17 commences now, or commences on April 15th.

18 And by "consent discovery," what I mean is did
19 Mr. Mantha sign the forms or give his cell phone number,
20 number one; and number two, whatever it is that defendant is
21 relying on, to assert that he agreed, then, like, the
22 disclosure or the document that he e-signed on the Internet,
23 whatever it is, any discovery about that, with discovery on
24 those topics closing June 30th.

25 Defendant move for summary judgment on those two

1 issues July 31. Opposition by August 30th. Reply by
2 September 21st. Sur-reply, September 28th.

3 I'm neither rejecting or allowing, at the moment,
4 the question of this other discovery about the call records.
5 I want to think about that a little bit and whether it's
6 appropriate; and if it is appropriate, what would be
7 appropriate. And so I just want to think about it. And I
8 will either issue an order pretty soon addressing it, or if I
9 have more questions about it, I might set up another status
10 conference to talk to you about it.

11 MR. POLANSKY: Your Honor, we would also be happy
12 to brief, you know, file a motion to bifurcate, if that would
13 be, you know, the Court's wish, as well.

14 THE COURT: I don't think -- I mean, I think I
15 know -- I don't think I need a brief on bifurcation. Neither
16 of you question, and I think I have the authority to
17 structure the discovery however it makes sense under Rule 26.
18 So I don't think like -- essentially, in the one sense, I
19 bifurcated the discovery right here. We're doing this
20 consent question. If we don't do anything else, we're doing
21 that. And we'll do everything else later. Not discovery
22 about other things.

23 So just to clarify, so you don't get into fights, I
24 could see a deposition in this initial period about
25 plaintiff, about this -- these narrow issues, and I guess I

1 would say to all of you, be reasonable. In other words, it's
2 not the opportunity -- it's not like one and done. On the
3 other hand, it's not like -- we're not going to subject him
4 to multiple seriatim depositions to go over the same thing.
5 So if you want his deposition about this, I could see why you
6 might, take a deposition about this, and see if you can't
7 reach an agreement on how you deal with -- if he needs to be
8 deposed again later, how you would do that. And be practical
9 about that, both of you.

10 So I think the real question comes down to
11 whether -- whether there should be this discovery about the
12 automatic -- the call records from Drips, and if so, what's
13 the scope of it. I want to think about that a little bit.
14 And I don't think it's really a question, at the moment, for
15 briefing. But if it is, I think it would be less a question
16 of legal briefing and more a question of, like, more
17 specifically what exactly does plaintiff want, more
18 specifically what do you object to or how do we do it, and
19 then we get into that. So I want to think about the whole
20 range of issues, and so I'm going to reserve on that.

21 I don't think I'm going to issue a written
22 scheduling order. The clerk's notes will reflect these
23 dates, unless you -- I don't think you need one.

24 Do you?

25 MR. POLANSKY: I don't think so, Your Honor. As

1 long as the clerk's notes reflect the dates, I think we
2 should be fine.

3 THE COURT: All right. And I would say, if there
4 are any motions to compel that arise out of this -- the two
5 things I would just say, so we're clear, one is, given that
6 the discovery ends on July 30th -- this is probably
7 obvious -- but you can't, on June 30th, you can't serve a
8 discovery request on June 29th for documents that would be
9 due July 29th. You have to serve your requests in time that
10 they're done by June 30th.

11 And second, if there are motions to compel that
12 arise out of this discovery, then they have to be filed by
13 July 7th.

14 And in order to keep this moving, and frankly, just
15 to do discovery motions more efficiently, do the following:
16 Don't file a normal discovery motion. If you have a
17 discovery dispute and you confer, you can't work it out and
18 you're ready to file a motion to compel or motion to quash,
19 or whatever, if you can work together reasonably, my
20 suggestion is you do this: You file a joint status report,
21 where, let's say, plaintiff wants an answer to an
22 interrogatory, and you say, "No, you don't get that."

23 Plaintiff, you say, "Here's the interrogatory.
24 Here's the answer that was given to us. Here's our
25 explanation of why we get more."

1 You, Mr. Polansky, stick into it why they don't get
2 more, why what you gave them is enough.

3 You can do whatever back and forth until you're
4 satisfied with each of your two paragraphs, and then you give
5 me that document. And if there's more than one request, just
6 repeat that for the other request.

7 My experience is, if you do that, (a), it's way
8 quicker than filing the brief and two weeks for the
9 opposition and then potentially a reply. It's focused. The
10 question is what's the -- I don't really need a long, legal
11 brief on the law of discovery. I really need to know what do
12 you want; what does the other side not want to give you; why
13 do you want it or think you get it; and why don't you think I
14 have to turn it over. And then with that, I'll read it, and
15 maybe have a conference with you on the phone, like this, and
16 we'll work it out. And my experience is that's the faster,
17 cheaper, and you get a better answer.

18 So do that. Do that by July 7th, if you have a
19 dispute. You can do it earlier. I don't have any problem if
20 it comes up earlier, and it makes sense to do it earlier,
21 just do it earlier. But July 7th, for sure, unless you
22 continue that. Because otherwise then I'm going to assume
23 that the discovery issues as to this issue are resolved.

24 As to the call dialing records, and the like, I
25 want to think about that, and I will circle back to you in

1 one form or another about it.

2 Is there anything else from the plaintiff?

3 MR. MCCUE: Just quick, Your Honor, as to the call
4 records, we, of course, would be agreeable or amenable to
5 accept those under protective order, if the Court were so
6 inclined. The follow-up question is does the Court have a
7 form protective order that it generally wants us to use?

8 THE COURT: Your question is a great one. I don't
9 have, at the moment, a -- I don't -- you can look on -- there
10 is a -- on my website, on the Court's website, under my name,
11 there is a form protective order, but that's to address a
12 very narrow circumstance. I don't think it's what you're
13 talking about here. So the short answer is, no, I don't have
14 one. The longer answer, since you raised the topic, is I
15 have thought for a long time that a really useful thing to
16 save me a lot of work and all of you a lot of money would be
17 to have a form -- and really, the court, not just for me, it
18 would really be better if it were court-wide, a form
19 protective order with a rule that said, "This is the
20 protective order" -- "if you want a protective order, this is
21 the protective order." Or you submit it, red line, just, "We
22 want this extra paragraph because we have a special issue,"
23 or, "We want to delete that paragraph," for some reason, and
24 then that's all you have to address. But I have never found
25 time on a Saturday afternoon to write that or --

1 MR. MCCUE: There are other judicial districts that
2 have them, so I'll probably pull the one from Northern
3 District of Illinois, it's the one I typically use, and we'll
4 start from there. But, of course, I'm open.

5 THE COURT: That's fine with me. I'd like to
6 conclude that means that I have more of a life than the
7 judges in the Northern District of Illinois, but I don't know
8 if that's true.

9 MR. MCCUE: Especially these days.

10 THE COURT: Yes. Right. Exactly.

11 But if you -- one thing, like, if you do -- if we
12 get to that and you do that, that's fine to pull that. If
13 you know, off the top of your head, without doing any
14 research or work, districts beyond the Northern District of
15 Illinois that have on their website the form protective
16 orders, send Maria an e-mail that just says, "Hey, here's the
17 couple districts that I know of that have it."

18 MR. MCCUE: Sure.

19 THE COURT: Because it is something that I think
20 that would be useful for us to have, because there's so many
21 cases with protective orders, and there's no reason to
22 rewrite them or judges to reread them, and they're mostly
23 boilerplate.

24 MR. MCCUE: I can do that, Your Honor.

25 THE COURT: Great. Okay. Anything else for the

1 defendant?

2 MR. POLANSKY: No, Your Honor. Thank you very much
3 for your time today.

4 THE COURT: Okay. Have a good day. Stay healthy,
5 all of you. We're adjourned.

6 THE DEPUTY CLERK: This matter is adjourned.

7 (Court in recess at 11:00 a.m.)
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CERTIFICATE OF OFFICIAL REPORTER

I, Rachel M. Lopez, Certified Realtime Reporter, in and for the United States District Court for the District of Massachusetts, do hereby certify that pursuant to Section 753, Title 28, United States Code, the foregoing pages are a true and correct transcript of the stenographically reported proceedings held in the above-entitled matter and that the transcript page format is in conformance with the regulations of the Judicial Conference of the United States.

Dated this 8th day of June, 2020.

/s/ RACHEL M. LOPEZ

Rachel M. Lopez, CRR
Official Court Reporter